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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TERESA HOBBINS; KENNETH A. SHAPIRO; WILLIAM DRAKE, Pharm. D.; and ELLIOT D. LUBY, M.D.,

Petitioners,

—v.—

ATTORNEY GENERAL OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

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QUESTION PRESENTED

Whether a state may, consistent with the Fourteenth Amendment's Due Process Clause, absolutely prohibit competent terminally ill persons from making the choice, during the end stages of their terminal illness, to hasten inevitable death by the use of physician-prescribed medications?

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ATTORNEY GENERAL OF MICHIGAN,

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PETITION FOR A WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

Teresa Hobbins, Kenneth A. Shapiro, William Drake, and Elliot D. Luby respectfully petition for a writ of *certiorari* to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court has not yet been officially reported, and is set out in the Appendix to this Petition as pp. 1a-107a. The Opinion of the Michigan Court of Appeals has been officially reported at 205 Mich. App. 194, 518 N.W. 2d 487 (1994), and is set out

in the Appendix to this Petition as pp. 108a-140a. The Amended Opinion of the Wayne Circuit Court has not been officially reported and is set out in the Appendix to this Petition as pp. 141a-159a.

STATEMENT OF JURISDICTION

The judgment of the Michigan Supreme Court in this case was rendered on December 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Fourteenth Amendment's Due Process Clause, which provides in part: "[n]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The Nature of the Plaintiffs' Constitutional Claim

Plaintiffs Teresa Hobbins and Kenneth Shapiro are terminally ill cancer patients. When they reach the end stages of their terminal illness, they want to have the choice to end their pain and suffering and to hasten inevitable death by the use of physician-prescribed medications. They also wish to be able to have the assistance of family members or friends in consuming those medications should this become necessary. In the State of Michigan, "assistance to suicide" is a criminal offense. It is undisputed that the crime of "assistance to suicide" precludes physicians and others from giving any assistance whatsoever to competent terminally ill patients in

implementing their decision to hasten inevitable death. Specifically, the crime of "assistance to suicide" prohibits a physician from providing a terminally ill person with opiates, barbiturates and other lethal medications in sufficient quantities so that the terminally ill person could, in the end stages of the terminal illness, make the choice to hasten inevitable death by consuming a lethal quantity of those medications.

B. The Proceedings Below

On March 1, 1993, plaintiffs Hobbins and Shapiro, joined by a number of health care professionals,[1] brought suit in the Circuit Court of Wayne County, Michigan, against the Michigan Attorney General, seeking a declaration that Michigan's recently enacted "assistance to suicide" statute, Mich. Comp. Laws 752.1027, was unconstitutional, and further seeking an injunction against its enforcement. They alleged that the statute was improperly enacted under the Michigan Constitution, and further alleged that the absolute ban on "assistance to suicide" violated the Fourteenth Amendment's Due Process Clause. The Circuit Court found that the statute was improperly enacted under the Michigan Constitution, and further found that the plaintiffs had shown a substantial likelihood of prevailing on the merits of their Due Process

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[1]The Circuit Court found that two of these health care professionals, plaintiff Drake, a pharmacist, and plaintiff Luby, a psychiatrist, had standing to challenge the statute, but that the other health care professional plaintiffs did not. Although those plaintiffs appealed the Circuit Court's decision on the standing question to the Michigan Court of Appeals, that issue was not decided by the Court of Appeals, and it was not involved in the proceedings before the Michigan Supreme Court. For this reason, only plaintiffs Drake and Luby have joined plaintiffs Hobbins and Shapiro in filing this Petition for *Certiorari*.

claim. The Circuit Court granted summary disposition and struck down the statute. The Attorney General filed an appeal to the Michigan Court of Appeals.

In the proceedings before the Michigan Court of Appeals, the present case was joined with appeals involving three criminal prosecutions that had been brought against a Michigan physician, Dr. Jack Kevorkian. Two of these prosecutions were for a violation of the "assisted suicide" statute, and one was a murder prosecution for assisting in a suicide prior to the enactment of the statute. In a 2-1 decision, the Michigan Court of Appeals agreed with the Wayne Circuit Court that the "assisted suicide" statute was improperly enacted under the Michigan Constitution and affirmed the judgment of the Wayne Circuit Court in that respect. On that basis it also held that Dr. Kevorkian could not be prosecuted for a violation of the "assisted suicide" statute. Lining up differently, the panel of the Michigan Court of Appeals then held in a 2-1 decision that the "assisted suicide" statute did not violate the Fourteenth Amendment's Due Process clause, and reversed the judgment of the Wayne Circuit Court to that effect. Finally, the Court of Appeals held in a 2-1 decision, that "assisted suicide" could be prosecuted as murder under Michigan law.

The present plaintiffs and the Attorney General both filed applications for leave to appeal to the Michigan Supreme Court. Applications for leave to appeal were also filed by all the parties in the Kevorkian prosecutions. Leave to appeal was granted to all of the parties, and the cases were argued in tandem on October 4, 1994.

C. The Decision of the Michigan Supreme Court

On December 13, 1994, the Michigan Supreme Court rendered its decision. It first held that the statute had been properly enacted under the Michigan Constitution and in that respect reversed the judgment of the Court of Appeals, which had held to the contrary.[2] It also held that there was no constitutional right to "assisted suicide" under the Fourteenth Amendment's Due Process Clause, and in that respect affirmed the judgment of the Court of Appeals.[3] Finally, it held that in some circumstances, "assisting a suicide" could be prosecuted as murder, but that in any event, "assisting a suicide" could be prosecuted in Michigan as a separate common law felony, under the savings clause of Mich. Comp. Laws 750.505.[4]

As a result of the Michigan Supreme Court's decision in the present case and in the companion cases involving the criminal prosecutions against Dr. Kevorkian, "assistance to suicide" is a criminal offense in Michigan,[5] and the

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[2]All seven Justices of the Michigan Supreme Court concurred in this holding.

[3]Justices Levin and Mallett dissented from this holding in separate opinions, in which each other joined.

[4]Justices Boyle and Riley dissented from this holding, but it was concurred in by Justices Levin and Mallett. Under Mich. Comp. Laws 750.505, an offense that is indictable at common law and that is not otherwise punishable by statute remains a felony, punishable by up to 5 years imprisonment.

[5]There is some question as to whether the "assistance to suicide" statute expired by its own force, but that question is of no moment as regards the plaintiffs' constitutional claim, since "assistance to suicide" has now been declared by the Michigan Supreme Court to be a common law

plaintiffs' claim of a constitutional right to make the choice to hasten inevitable death by the use of physician-prescribed medications during the end stages of their terminal illness has been rejected by the Michigan Supreme Court. The plaintiffs seek a writ of *certiorari* from this Court to review the judgment of the Michigan Supreme Court rejecting their federal constitutional claim.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

In American society today, terminally ill persons are asserting the right to control their own destiny and to make the choice, in the end stages of their terminal illness[6], to

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felony. A physician who furnished the plaintiffs with a lethal supply of medications that they could use to make the choice to hasten inevitable death during the end stages of their terminal illness could be prosecuted for the common law offense and would face five years' imprisonment. There can be no question, therefore, as to the plaintiffs' continuing standing to assert their federal constitutional claim. *Roe v. Wade*, 410 U.S. 113 (1973).

[6]A "terminal" condition means "an incurable physical state caused by injury, disease, or illness which, regardless of the application of 'life sustaining procedures,' would produce death within a reasonable degree of medical probability, and where the application of life sustaining procedures serves only or primarily to postpone the moment of the patient's medico-legal death." *The Sloane-Dorland Annotated Medical-Legal Dictionary (1987)*, p. 711 (citation omitted)

The generally accepted meaning of "terminal illness" is a life expectancy of 6 months or less. For example, Medicare regulations governing eligibility for hospice care require a certification that "specif[ies] that the individual's prognosis is for a life expectancy of 6

hasten inevitable death rather than to continue to undergo unbearable pain and suffering. They seek the autonomy to choose the timing of their death and to bring their suffering to a merciful end. Physicians who treat terminally ill persons have come to recognize the rights of their patients to make the choice to hasten inevitable death, and in appropriate cases, wish to provide the means to enable them to do so. Specifically, in the present case they wish to provide their terminally ill patients with opiates, barbiturates and other medications in sufficient quantities that the patients may, *if they choose to do so*, hasten their inevitable death by consuming a lethal quantity of those medications. Under the law of Michigan and many other states,[7] physicians who supply lethal medications to their terminally ill patients for this purpose are subject to criminal punishment because they are considered to have "assisted a suicide."

Although laws against "assisted suicide" have long been in effect in many states, these laws have rarely been enforced. The original purpose of these laws was to prevent "assisting a suicide" in the ordinary sense of the term, *i.e.*, assisting a person in ending a life that was otherwise of indefinite duration, such as by helping a person jump off a bridge or providing a person with a gun to turn on himself.[8] These laws against "assisted suicide,"

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months or less if the terminal illness runs its normal course." 42 C.F.R. §418.22.

[7]The Michigan Supreme Court identified 30 other states and Puerto Rico and the Virgin Islands that by statute make "assistance to suicide" a criminal offense. (Appendix at pp. 39a-40a, n.51)

[8]This case does not challenge the Michigan law as it prohibits "assistance to suicide" in the ordinary sense of the term. Plaintiffs are unaware of any cases which suggest the state cannot lawfully prohibit a

however, are by their express terms also applicable to a physician assisting terminally ill persons in implementing their choice to hasten inevitable death by the use of physician-prescribed medications. And Michigan, which did not have a statute prohibiting "assisted suicide" prior to 1992, enacted such a statute for the specific purpose of prohibiting "physician-assisted suicide."

The plaintiffs in this case focus on that aspect of the Michigan law which prohibits competent, terminally ill persons from receiving the assistance of their physicians to hasten inevitable death. The constitutionally impermissible effect of laws which absolutely prohibit "assisted suicide" is to prevent physicians from assisting their terminally ill patients in implementing the patients' choice, in the end stages of their terminal illness, to hasten inevitable death by the use of physician-prescribed medications. It is for this reason that the terminally ill plaintiffs in the present case, and terminally ill plaintiffs in other cases, have brought constitutional challenges to legal prohibitions against "assisted suicide."

The terminally ill plaintiffs' constitutional challenge to legal prohibitions against "assisted suicide" is well-grounded in the constitutional doctrine and precedents of this Court applicable to the protection of personal autonomy under the Fourteenth Amendment's Due Process Clause. This

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person from assisting another healthy person from committing suicide. This is because the state has a compelling interest in preserving the life of healthy persons. *Roe v. Wade*, 410 U.S. 113 (1973). It is well-settled that the state may, consistent with due process, prohibit otherwise healthy persons from doing things that are harmful to their health or safety, such as taking dangerous drugs, or driving without a seatbelt. *See e.g., Addington v. Texas*, 441 U.S. 418 (1979); *Heller v. Doe*, 113 U.S. 2637 (1993) (involuntary commitment of mentally ill persons who present a threat of danger to themselves or others).

doctrine was recently set forth by this Court in *Planned Parenthood of Pennsylvania v. Casey,* 505 U.S. __, 112 S. Ct. 2791 (1992):

> "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter .... It is settled now ... that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity .... At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."

112 S.Ct. at 2807.

The decision of a terminally ill person, in the end stages of that person's terminal illness, to hasten inevitable death and bring to an end unbearable pain and suffering is a "most basic decision[ ] about ... bodily integrity." It is a decision relating to "defining one's own concept of existence, of the meaning of the universe, and of the mystery of human life." The terminally ill person's beliefs about hastening inevitable death during the end stages of the terminal illness "could not define the attributes of personhood were they formed under the compulsion of the State."

This Court's precedents also extend strong constitutional protection to a person's entitlement to bodily integrity and control over that person's own body. These precedents recognize a woman's constitutionally-protected right to a pre-viability abortion. *Casey, supra; Roe v. Wade,*

410 U.S. 113 (1973). They recognize the right of a competent adult to make the personal decision to refuse medical treatment, including lifesaving hydration and nutrition. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). They recognize the right of a prisoner to avoid the unwanted administration of anti-psychotic drugs. *Washington v. Harper*, 494 U.S. 210 (1990). The right of a terminally ill person, in the end stages of that person's terminal illness, to make the choice to hasten inevitable death by the use of physician-prescribed medications, therefore, falls squarely within this Court's constitutional doctrine and precedents applicable to the protection of personal autonomy under the Fourteenth Amendment's Due Process Clause.

The state can have no legitimate -- let alone compelling -- governmental interest in denying terminally ill persons the right to choose to hasten inevitable death during the end stages of their terminal illness. The interest typically asserted by the state to justify a ban on "assisted suicide" is the interest in "preserving life." *But the competent terminally ill person who has chosen to hasten inevitable death has decided there is no meaningful life left to preserve.* The terminally ill person at the end stages of the illness is dying. The body has lost its struggle with disease. There is no medical treatment that can arrest the path of the disease toward inevitable death. All that the physician can do is to try to alleviate pain and suffering until death comes. The state can have no valid interest whatsoever in prolonging this process, and certainly not in prolonging suffering, yet that is exactly what the state is doing when it prohibits competent terminally ill persons from making the choice to hasten inevitable death by the use of physician-prescribed medications.

In *Casey*, this Court held that the state may not impose

an undue burden on the exercise of a person's fundamental right to reproductive choice, and that a law imposes an undue burden on that right when it presents a *substantial obstacle* to a person's exercising that right. Even assuming *arguendo* that the same standards apply to a competent, terminally ill person's decision to hasten death, an absolute ban on *any* assistance by physicians, in the form of prescribing lethal quantities of medications for the terminally ill person, or by family members or friends, imposes an undue burden on the right of a terminally ill person to make the choice to hasten inevitable death during the end stages of the terminal illness.[9]

Additionally, an absolute ban on any assistance by physicians, family members or friends imposes an undue burden on the right of a competent adult to refuse medical treatment, including lifesaving hydration and nutrition, recognized by this Court in *Cruzan*. Michigan Supreme Court Justice Charles Levin pointed out in dissent:

> Barring such persons from taking other steps to end their lives would,... constitute an undue burden on the right implicitly recognized in *Cruzan*. *Cruzan* should not be read as limiting a person to a half step when that would result in greater suffering.

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[9]The state, of course, may impose reasonable regulations on physician participation in providing assistance to the terminally ill in implementing their choice to hasten inevitable death. The state, for example, might decide to limit physician participation in providing assistance to the terminally ill to clinical physicians or to physicians who have been directly involved in the care of the terminally ill patient. The state might also decide to require a second physician's opinion to confirm that the patient has a terminal illness, and that the patient is competent to choose to hasten death.

Appendix at p. 85a. (Levin., J., concurring in part and dissenting in part.)

The present case is the first case which presents this issue decided by the highest court of a state or by a federal court of appeals to reach this Court. Other cases raising the same constitutional question of the right of the terminally ill to make the choice to hasten inevitable death are currently pending in the lower federal courts.[10] It is in the public interest that the question of whether terminally ill persons have a constitutionally-protected right to make the choice, during the end stages of their terminal illness, to hasten inevitable death by the use of physician-prescribed medications be decided authoritatively by this Court. Most surely, this question satisfies all of the elements of "an important question of constitutional law which has not been, but which should be, settled by this Court." Sup. Ct. R. 10.1(c). This Court should grant the petition for a writ of *certiorari* so that it can decide this important question.

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[10]In *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), appeal pending, 9th Cir., Docket No. 94-35534, the District Court declared the State of Washington's ban on "assisted suicide" unconstitutional insofar as it prohibited terminally ill persons from making the choice to hasten inevitable death by the use of physician-prescribed medications. A contrary result was reached in a similar challenge to New York's ban on "assisted suicide." *Quill v. Koppel*, U.S.Dist.Ct., S.D.N.Y., 12/15/94, 1994 U.S.Dist.LEXIS 17965, appeal pending *sub nom Quill v. Koppel*, 2d Cir., Docket No. 95-7028. A federal District Court in Oregon has preliminarily enjoined the implementation of that state's new law regulating physician-assisted suicides, a law enacted by the voters via a ballot proposal last November. *Lee v. Oregon*, U.S. Dist. Ct., OR, 12/27/94, No. 94-6167-HO.

CONCLUSION

For the reasons stated herein, the petition for a writ of *certiorari* to review the judgment of the Michigan Supreme Court in the present case should be granted.

Respectfully submitted,

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